

Is a Truth Commission the Solution to Restoring Peace in Post-Conflict Iraq?

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I. INTRODUCTION

On December 13, 2003, the United States military captured former Iraqi dictator Saddam Hussein.¹ Saddam's capture brought the prospect of peace in a region scarred by decades of violence, oppression, and widespread human rights abuses.² President George W. Bush offered this message to the Iraqi people in the days following Hussein's capture:

You will not have to fear the rule of Saddam Hussein ever again. All Iraqis who take the side of freedom have taken the winning side. The goals of our coalition are the same as your goals—sovereignty for your country, dignity for your great culture, and for every Iraqi citizen, the opportunity for a better life.

In the history of Iraq, a dark and painful era is over. A hopeful day has arrived. All Iraqis can now come together and reject violence and *build a new Iraq*.³

Iraq took the first significant step towards President Bush's vision on June 28, 2004, when the U.S. military relinquished power to an interim Iraqi government.⁴ The interim government will maintain power in Iraq until general elections are held in early 2005.⁵

¹ Susan Sachs, *The Capture of Hussein: Ex-Dictator; Hussein Caught in Makeshift Hide-Out, Bush Says 'Dark-Era' for Iraqis is Over*, N.Y. TIMES, Dec. 15, 2003, at A1. The once all-powerful leader of Iraq, Saddam Hussein was arrested without a fight by the American military, who found him submerged in an eight-foot hole at a farm near Tikrit. *Id.* The soldiers found him haggard, dirty, and disoriented after nine months of eluding capture. *Id.*

² See *id.*

³ Office of the Press Secretary, *President Bush Addresses Nation on the Capture of Saddam Hussein* (Dec. 14, 2003), at <http://www.whitehouse.gov/news/releases/2003/12/20031214-3.html> (emphasis added).

⁴ Todd Richissin, *Cautious Iraqis Not Ready to Celebrate*, BALTIMORE SUN, June 29, 2004, at 1A, available at LEXIS, News Library, Balsun File.

⁵ 73 Days and Counting; June 30 Deadline; How to Move Iraq Toward Democracy, NEWSDAY, Apr. 18, 2004, at A56.

The obstacles facing the interim government and the future elected leaders in Iraq are daunting.⁶ Among other things, Iraq's new government will have to continue American efforts in rebuilding civilian and government infrastructure, raising an army, maintaining peace in the war-ravaged and ethnically diverse cities throughout Iraq, facilitating private business, developing a national economy, and, finally, developing social policies on everything from education to health care.⁷ This will take time, discourse, and debate.

The focus of this Note, however, is on an issue the Governing Council and future Iraqi leaders must confront without delay: What should the people of Iraq do with members of Saddam Hussein's regime still residing in Iraq who are responsible for human rights abuses? A critical aspect to Iraq's peaceful transition is how the new Iraqi government addresses the human rights atrocities committed during Saddam's reign and deals with the perpetrators of those abuses.⁸ Only a month after Saddam's capture,

⁶ See, e.g., Phil Reeves, *The Capture of Saddam Hussein: Euphoria Today, but Difficulties Lie Ahead*, INDEPENDENT (London), Dec. 15, 2003, at 6, available at LEXIS, News Library, Indpnt File. In the wake of Hussein's capture, the United States and the interim Iraqi government will face several challenges if they hope to offer the 25 million Iraqi citizens "the prospect of a peaceful future." *Id.* For example, the U.S. must establish a new Iraqi security force which can competently defend the new governing authority from well-trained guerrilla cells and suicide bombers. *Id.* The U.S. and the Iraqi Governing Council must also devise a means for creating a transitional government that appeases the Shi'a majority and allays the Sunni minority's fears of being excluded from power. *Id.* These examples represent only a small part of the daunting tasks that lie ahead for the emerging leaders of Iraq. See also John F. Burns, *A Region Inflamed: Violence; At Least 143 Die in Attacks at Two Sacred Sites in Iraq*, N.Y. TIMES, Mar. 3, 2004, at A1.

⁷ Rajiv Chandrasekaran, *Attacks Force Retreat From Wide-Ranging Plans for Iraq*, WASH. POST, Dec. 28, 2003, at A01. The U.S. plans to hand over power to a provisional Iraqi government on July 1, 2004. *Id.* Before it does so, U.S. officials are scrambling to put the necessary physical, financial, and governmental infrastructure in place to assist Iraq in this transition. *Id.*

The U.S. administrator of Iraq, Paul Bremer, and his deputies are "focused on forging compromises with Iraqi leaders and combating a persistent insurgency in order to meet a July 1 deadline to transfer sovereignty to a provisional government." *Id.* Among other things, U.S. officials are attempting to assist Iraq in privatizing Iraq's 48 state-owned businesses, writing an Iraqi Constitution, overhauling "a national food rationing program that was a cornerstone of Hussein's welfare state," rebuilding hundreds of schools, and rebuilding and expanding the country's electrical, water, and sewage systems. *Id.* U.S. officials believe these are necessary steps for a stable transition to a sovereign Iraq. *Id.*

⁸ The Iraqis are anxious to start the criminal proceedings against Saddam Hussein for his human rights abuses. Rajiv Chandrasekaran, *Iraqi Planners Hope to Start Trial by*

thousands of demonstrators marched in cities throughout Iraq, chanting "Saddam is a war criminal, not a POW. Execute Saddam."⁹ The Iraqi people seek retribution against Saddam and his government, and the new government must find the best way to deliver it.¹⁰

Saddam Hussein should and will face prosecution for his war crimes, crimes against humanity, and other human rights violations.¹¹ However, the more complicated question for Iraq will be how to address the less significant villains of Saddam's Iraq. The U.S. military has had as many as 12,000 Iraqi prisoners of war in custody.¹² A majority of those prisoners may have participated, at some level, in the massive human rights violations committed during Saddam's rule.¹³ In addition, many Ba'ath Party members, Republican Guard soldiers, and Fedayeen militiamen remain at large in Iraq.¹⁴ The new Iraqi government must find a solution for bringing these

Spring, WASH. POST, Dec. 16, 2003, at A01. One Iraqi Governing Council member, Mowaffak Rubaie, who had been arrested and tortured by Hussein's secret police, stated, "We can't delay this. It's an integral part of national reconciliation. We can't begin the process of reconciliation until we show the people that the man at the top, who was responsible for unspeakable terror, is brought to justice." *Id.*

⁹ *Shia Protesters Want Saddam Executed*, NEWSDAY, Jan. 21, 2004, at A14.

¹⁰ *Id.*

¹¹ See James Drummond & Nicolas Pelham, *Saddam Mocks Iraqi Court: Fears are Raised that Former Dictator's Defiance will Re-open Old Wounds and Give Heart to Insurgents*, FINANCIAL TIMES (London), July 2, 2004, at 1, available at LEXIS, News Library, Fintme File.

¹² See Michael Kilian, *U.S. Rocketing Down a Road that Leads to Victory, Vietnam-Style*, CHI. TRIB., Aug. 10, 2003, at C1.

¹³ Since the Allied Forces established the Nuremberg Tribunal to prosecute German war criminals following World War II, the international community has continuously rejected the view that individuals who commit human rights violations are not criminally responsible merely because they were accepting orders. See Guenael Mettraux, *Crimes Against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda*, 43 HARV. INT'L L.J. 237, 308-11 (2002). As the Nuremberg Tribunal stated:

Individuals have international duties which transcend the national obligations of obedience imposed by the individual state. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the state if the state in authorizing action moves outside its competence under international law.

The Nuremberg Trial, 6 F.R.D. 69, 120 (1946) (paraphrasing the charter of the League of Nations). Based on the Nuremberg precedent, members of Saddam's regime who followed orders and committed human rights atrocities are criminally accountable.

¹⁴ Attacks targeting U.S. military forces and Iraqi civilians have continued to occur almost daily in Iraq, even in the wake of Saddam's capture. See, e.g., Thanassis Cambanis, *Captive Guerilla Tied to Hussein Said to Receive \$1M for Attacks*, BOSTON

criminals to justice if it hopes to stabilize the country, prevent future violence, and gain legitimacy from its citizens and the international community.¹⁵

One option is the use of traditional criminal trials.¹⁶ Proponents of criminal trials argue that those responsible for ordering, participating, planning, or carrying out human rights abuses in Iraq must be punished.¹⁷ Opponents of this retributive-driven theory of justice argue that massive prosecutions of this nature are ineffective in transitional, post-conflict regions such as Iraq,¹⁸ and that they do little in promoting a transitional state's overarching goals of restoring peace and maintaining stability.¹⁹ These commentators offer an alternative means of dispute resolution that, they argue, can go further in reconciling the people who live in these

GLOBE, Dec. 18, 2003, at A1. U.S. Intelligence indicates that two days before his capture, Saddam Hussein met with a top lieutenant, Qais Hattam, who was coordinating guerrilla attacks on the "Highway of Death" leading north from Baghdad to Tikrit. *Id.* The U.S. military seized Hattam and 73 suspected Fedayeen guerrillas in a farmhouse, along with explosives and documents. *Id.* Hattam told a U.S. military commander that Saddam paid him over \$1 million to finance the attacks. *Id.* This event demonstrates that although Saddam himself is no longer a threat, many of his supporters remain at large in Iraq and continue to threaten the stability and viability of a democratically elected Iraqi government.

¹⁵ See generally Thomas D. Grant, *Agora (Continued): Future Implication of the Iraqi Conflict: The Security Council and Iraq: An Incremental Practice*, 97 AM. J. INT'L L. 823, 829 (2003). The United Nations Security Council stated in Resolution 1500 that the newly formed Iraqi Governing Council is an "an important step towards the formation by the people of Iraq of an internationally recognized, representative government that will exercise the sovereignty of Iraq." *Id.* at 834 (internal citation omitted).

¹⁶ See Christopher Greenwood, *Where Should Saddam Face His Accusers?*, TIMES (London), Jan. 13, 2004, at 5.

¹⁷ Cf. Michele Cotton, *Back With a Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment*, 37 AM. CRIM. L. REV. 1313, 1315-16 (2000) (explaining that the retributive theory of justice holds that the punishment of a crime is a right in itself, that the guilty should suffer, and that justice, or the moral order, requires the institution of punishment).

¹⁸ Charles Villa-Vicencio, *Why Perpetrators Should Not Always be Prosecuted: Where the International Criminal Court and Truth Commissions Meet*, 49 EMORY L.J. 205, 209-13 (2000).

¹⁹ Maryam Kamali, *Accountability for Human Rights Violations: A Comparison of Transitional Justice in East Germany and South Africa*, 40 COLUM. J. TRANSNAT'L L. 89, 96 (2001) ("Respect for the rule of law will, in turn, play an important role in bringing about reconciliation and in deterring future human rights violations. Indirectly, then, the emphasis on reforming the legal system is a constructive step in the pursuit of truth, justice, and reconciliation.").

conflicted regions and preventing the reoccurrence of similar conduct in the future—a truth commission.²⁰

The remainder of this Note discusses the recent development of truth commissions as an alternative method of dispute resolution and assesses the utility of a commission in post-conflict Iraq. While a limited use of a truth commission in Iraq would be beneficial, international law and other practical concerns demand the use of criminal trials in certain circumstances. Therefore, the best solution in Iraq for dealing with human rights abusers would be a hybrid system that utilizes both domestic trials and a truth commission.

Part II of this Note provides an overview of the nature and extent of human rights abuses documented during Saddam Hussein's regime. Part III defines a truth commission, explains the logic that led to the development of this alternative form of dispute resolution, and provides an illustration of the most successful truth commission to date—the South African truth and reconciliation commission. Part IV examines the efficacy of the other models of justice (international criminal tribunals, domestic trials, and amnesties) traditionally used in post-conflict regions and the utility of their potential application in Iraq.

Part V examines the prospective legality of an Iraqi truth commission under current international law and demonstrates why international law requires some criminal liability for actors in Saddam's government. Part VI addresses some of the practical concerns with the perceived legitimacy of truth commissions as a method for addressing human rights violations in post-conflict regions and determines that a truth commission used in conjunction with domestic trials would bolster the legitimacy of the commission. Finally, Part VII examines whether a pure truth commission is a practical solution for the new Iraqi government to use in dealing with the members of Saddam's former regime, and concludes that a hybrid system with domestic trials and a truth commission is the better alternative.

II. BACKGROUND: SADDAM AND HIS GOVERNMENT'S RECORD OF HUMAN RIGHTS ABUSES

Saddam Hussein and his Ba'ath Party ruled Iraq for 25 years.²¹ Saddam's regime governed with an iron fist and maintained power by installing terror

²⁰ Villa-Vicencio, *supra* note 18, at 213–15.

²¹ Danna Harman, *The Day the Statue Fell, as Seen From Cairo to the Carolinas*, CHRISTIAN SCI. MONITOR, Apr. 14, 2003, at 1.

and fear in the Iraqi citizenry.²² Saddam presided over the Revolutionary Command Council (RCC). The RCC drafted Iraq's laws and issued decrees, which took precedence over all other Iraqi government institutions.²³ The content of these decrees directly establish the style and theme of Saddam's leadership: absolutely no dissent or else.²⁴

The human rights abuses documented during Saddam's rule are astonishing. Political dissenters, women, Kurds, and Shi'a Muslims all suffered tremendous persecution at the hands of Saddam and his regime.²⁵ Saddam's government tortured and killed thousands of political prisoners in a government campaign to "cleanse" the Iraqi prisons.²⁶ A 1990 RCC decree authorized male relatives to kill female relatives in the "name of honor" without any punishment.²⁷ Saddam's eldest son, Uday Hussein, was notorious for the serial rape and murder of young women.²⁸ For example, in 2000, Uday's Fedayeen militia beheaded hundreds of women accused of prostitution on the streets of Iraq without any judicial process.²⁹

²² United Nations High Commissioner for Human Rights, *Situation of Human Rights in Iraq: Commission on Human Rights Resolution 2002/15*, (Apr. 19, 2002). This resolution is available at the UNHCHR website, <http://www.unhchr.ch/>. On April 19, 2002, the U.N. Commission on Human Rights passed a resolution strongly condemning "the systematic, widespread and extremely grave violation of human rights and of international humanitarian law by the Government of Iraq, resulting in an all-pervasive repression and oppression sustained by broad-based discrimination and widespread terror." *Id.* As this report indicates, Hussein's method for retaining control was to eliminate the opposition and set an example to those who entertained the idea of challenging his authority. *See id.*

²³ FOREIGN & COMMONWEALTH OFFICE (London), *Saddam Hussein: Crimes and Human Rights Abuses*, at <http://www.iraqfoundation.org/hr/2002/cdec/irdp.pdf>, at 5 (Nov. 2002).

²⁴ One RCC decree, issued in 1992, guaranteed immunity for any Ba'ath Party member who caused damage to property, bodily harm, or even death when pursuing enemies of Hussein's regime. *Id.* at 5. Another RCC decree, passed in 2000, mandated amputation of the tongue as punishment for slander against Saddam or his family. *Id.* Decrees such as these demonstrate Saddam's method for preserving control over the Iraqi citizenry: fear, terror, and persecution.

²⁵ *See id.* at 9-18.

²⁶ The Iraqi government prohibited families of those deceased prisoners from burying their relatives, and often charged the prisoners' families for the bullet used in the execution. *Id.* at 12.

²⁷ *Id.* at 8.

²⁸ *Id.* at 7.

²⁹ *Id.* at 8. Uday maintained a personal torture chamber along the banks of the Tigris river known as the "al-Ghurfa al-Hamra" (the "Red Room"). *Id.* at 7. In one infamous act

Documents found in Iraq during the Gulf War detail Saddam's persecution of hundreds of thousands of Kurds living in northern Iraq throughout the 1980s.³⁰ The recovered documents detail the arrests and executions in 1983 of 8,000 Kurdish males over the age of 13.³¹ Additional reports indicate that over 100,000 Kurds disappeared or were killed between the years of 1987 and 1988.³²

The Iraqi Shi'a Muslim population also suffered greatly at the hands of Saddam and his government.³³ Saddam routinely executed Shi'a leaders and clerics who rose to power and threatened the authority of his rule.³⁴ Saddam and his Ba'ath Party's record of human rights abuses is astounding, and the list of documented incidents will only expand as witnesses and victims who once feared the dictator's wrath may now share their testimonies without the fear of retribution.

Although Saddam may ultimately be responsible for ordering many of these atrocities, there are thousands of other individuals who, over the last 25 years, followed Saddam's orders. Following orders is not a defense to human rights violations under international law.³⁵ As noted above, many of these perpetrators are still living in Iraq, and the new Iraqi government must establish a unified and national response for addressing these past violations.

of torture, Uday ordered the Iraqi soccer team caned on their feet after the team lost a World Cup qualifying match. *Id.*

³⁰ The four million documents found during the Gulf War confirmed Iraq's use of chemical weapons in a well-orchestrated genocide aimed at the Kurds living in Iraq during the 1980s. Holger Jensen, *Biological, Chemical Weapons Have Long Been a Part of Warfare*, ROCKY MOUNTAIN NEWS, Oct. 13, 2001, at 4A, available at LEXIS, News Library, Rmtnew File.

³¹ FOREIGN & COMMONWEALTH OFFICE, *supra* note 23, at 14.

³² *Id.*

³³ Jeffrey Weiss, *The Shiite State of Mind; They are the Majority in Iraq but Have a History of Persecution and Sacrifice*, DALLAS MORNING NEWS, May 10, 2003, at 1G, available at LEXIS, News & Business, Dalnws File. The Shi'ites are the largest minority sect in Islam. *Id.* They represent nearly 10% of the Muslim population worldwide and approximately 60% of the population in Iraq. *Id.*

³⁴ Reports indicate that more than 100 Shi'a clerics have disappeared in Iraq since 1991. FOREIGN & COMMONWEALTH OFFICE, *supra* note 23, at 16.

³⁵ See Mettraux, *supra* note 13, at 307-08.

III. THE DEVELOPMENT OF TRUTH COMMISSIONS AS AN ALTERNATIVE FORM OF DISPUTE RESOLUTION

A. Definition

A "truth commission" is now the common term "for an official investigative body that documents a pattern of past human rights abuses."³⁶ In the last two decades, several states implemented state-run programs resembling truth commissions,³⁷ and collectively these programs represent a new political response to a past of massive state violence.³⁸ Truth commissions provide an alternative method of addressing a state's violent past when the violence resulted in widespread human rights violations that occurred amidst ethnic, racial, class, or ideological disputes over justice and power.³⁹

Truth commissions are government bodies that have a specific mandate to investigate and document alleged human rights violations within that

³⁶ Judith Baker, *Truth Commissions*, 51 U. TORONTO L.J. 309, 309 (2001).

³⁷ Some well-known examples of truth commissions are the commissions established in Chile, Argentina, El Salvador, Guatemala, and South Africa. PRISCILLA B. HAYNER, *UNSPEAKABLE TRUTHS: CONFRONTING STATE TERROR AND ATROCITY* 15 (2001).

³⁸ See Carsten Stahn, *Accommodating Individual Criminal Responsibility and National Reconciliation: The U.N. Truth Commission for East Timor*, 95 AM. J. INT'L L. 952, 953 (2001). Stahn notes that:

The increasing reliance on truth and reconciliation commissions is based on the perception that they serve various purposes that are usually beyond the reach of national and international courts. Because they are vested with a general mandate to investigate human wrongs committed during a specific political conflict, truth commissions can amass a more comprehensive and diversified record of past injustices than individual trials. Rather than establishing the individual guilt of a person, they may focus on the broad patterns of violence in the conflict and their causes. Furthermore, they constitute a particularly well-suited platform for the accounts of victims and may uncover injustices otherwise silenced or denied. Finally, they render justice to the victims by formally acknowledging the abuses committed and providing for alternative forms of accountability, ranging from monetary reparation to the public identification of the perpetrators.

Id. at 954 (internal citations omitted).

³⁹ Henry J. Steiner, *Truth Commissions: A Comparative Assessment; An Interdisciplinary Discussion Held at Harvard Law School in May 1996*, at 1, 7 (1997), available at <http://www.law.harvard.edu/programs/hrp/Publications/truth1.html> (last visited Feb. 27, 2005).

country during a particular period of time in that state's history.⁴⁰ They are investigative bodies only; they have no authority to unilaterally prosecute individuals based on their findings.⁴¹ Instead, truth commissions investigate all aspects to a conflict in an attempt to establish a comprehensive version of what actually happened in that particular state.⁴²

Truth commissions are not adjudicative bodies. Unlike domestic trials or international criminal tribunals, the findings of truth commissions do not directly result in individual criminal liability.⁴³ Truth commissions "seek to discover the larger pattern of facts and conditions that led to massive human rights violations."⁴⁴ In fact, this is the most contentious aspect of truth commissions. As an incentive to develop this record and understanding of the truth, truth commissions in the past have offered amnesty in exchange for a full disclosure of the truth and circumstances behind an individual's human rights violations.⁴⁵

To put this in context, consider the situation in Iraq. Saddam Hussein and the Ba'ath Party ruled Iraq for 25 years. As discussed in Part II, tens of thousands of people were victims of human rights violations. If the Iraqi government established a truth commission to investigate the human rights abuses that occurred during Saddam Hussein's regime, the purpose would be to develop a comprehensive understanding of everything that happened during the last quarter century when Saddam was in power. However, to accomplish this, the government would have to provide some incentive to former members of Saddam's government to come forward and confess. In

⁴⁰ Rose Weston, *Facing the Past, Facing the Future: Applying the Truth Commission Model to the Historic Treatment of Native Americans in the United States*, 18 ARIZ. J. INT'L & COMP. L. 1017, 1020 (2001).

⁴¹ *Id.* at 1020-21.

⁴² *Id.* at 1021. One international affairs expert, Priscilla Hayner, who has done significant work in this area, stated that truth commissions typically have four basic elements: (1) Truth commissions are formed "to investigate past abuses"; (2) "[t]ruth commissions investigate" and document large incidents and "patterns of human rights abuses"; (3) truth commissions are provisional bodies created for a specific period of time and for a limited purpose, therefore the commission usually terminates upon submission of the official report; and (4) the state sponsor of the truth commissions vests the commission with enough authority to efficiently access information, conduct a thorough investigation, which provides a certain amount of legitimacy to the commission's final report. *Id.* at 1021 (internal citations omitted).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 1031.

the past, this incentive has been amnesty, for it is unlikely that someone would willingly come forward for anything less.

If these people did come forward, many families might discover what happened to their loved ones. The new government would learn how such a man rose to power and managed to maintain this control for as long as he did. A comprehensive report could provide a plethora of answers to the lingering questions from this regime, but the Iraqi government and citizens will ultimately have to face the larger question: What are we willing to give up in exchange for this version of the truth?

B. Transitional Justice: The Argument for the Use and Need of Truth Commissions in Post-Conflict States

To fully understand the origins of truth commissions as an alternative to traditional criminal prosecution and amnesties, it is important to appreciate the notion of "transitional justice."⁴⁶ This concept embraces the fact that when a state has been the subject of civil strife or ethnic, racial, or class violence, or has been overrun by a cruel totalitarian regime, that state has a multitude of challenges before it.⁴⁷ One of these challenges is addressing the fallen leaders of the oppressive regime and the perpetrators of the past violence.⁴⁸ As a result of intense political pressure from the citizenry, this task is often at the top of transitional states' agendas.⁴⁹

When confronting past atrocities, states typically have two goals in mind: reconciliation and deterrence.⁵⁰ Proponents of transitional justice argue that

⁴⁶ See Erin Daly, *Transformative Justice: Charting a Path to Reconciliation*, 12 INT'L LEGAL PERSP. 73, 73-76 (2002).

⁴⁷ *Id.* at 73. "As an anxious public and an impatient world look on," the new governments "must create new governing bodies, write new laws and repeal old ones, redefine the balance of private and public power, and organize elections." *Id.*

⁴⁸ See generally Ruti G. Teitel, *Human Rights in Transition: Transitional Justice Genealogy*, 16 HARV. HUM. RTS. J. 69 (2003).

⁴⁹ Daly, *supra* note 46, at 74.

⁵⁰ HAYNER, *supra* note 37, at 30. As Hayner notes,

Common wisdom holds that the future depends on the past: one must confront the legacy of past horrors or there will be no foundation on which to build a new society. Bury your sins, and they will reemerge later. Stuff skeletons in the closet, and they will fall back out of the closet at the most inauspicious times. Try to quiet the ghosts of the past, and they will haunt you forever By directly confronting the conflicts of the old . . . these conflicts will be less likely to explode into severe violence or political conflict in the future.

Id.

pure retribution, in the form of domestic or international criminal trials, simply does not provide normative solutions to achieving the state's goals.⁵¹ They argue that because of the unique situations typically confronting states in transition, states must implement a "transformative agenda" tailored to the needs of that particular state.⁵² Truth commissions can play a significant part in this transformative agenda.

Supporters of this view argue that truth commissions tailored to the needs of particular states will facilitate the peaceful and stable transition of the new governments and significantly assist these states in achieving their goals of reconciliation and deterrence.⁵³ Since 1974, there have been approximately 21 truth commissions.⁵⁴ The primary goal of all truth commissions is to establish an accurate record of a country's past in an attempt to clarify and acknowledge the truth about past state-sponsored human rights abuses.⁵⁵ However, truth commissions can also help facilitate a state's transition from a civil war or oppressive regime toward a more democratic, participatory, and representative-style government.⁵⁶ Democratic

⁵¹ Daly, *supra* note 46, at 108–09.

⁵² *Id.* at 109. As Daly notes, the problems confronting transitional governments vary from region to region:

Injustice in these societies may have many different faces: it may be seen in the deep rifts between people in different socio-economic classes or in rank racial or religious division; it may manifest itself in the lack of information about the past regime; it may be felt in the instability of the economy, or in the lack of adequate housing, health care, education, and other basic needs; it may be noticed when known wrongdoers stay in power or office or receive perquisites. In Rwanda, the genocide of 1994 left millions of people homeless and traumatized, and in desperate need of all manner of social services; in South Africa, apartheid was marked by the deliberate economic and civic repression of millions of blacks. In the former Yugoslavia, war left entire cities in tatters and in desperate need of repair. The number of homeless refugees in Afghanistan, East Timor, and Sierra Leone climbs daily.

Id. at 79–80.

⁵³ See, e.g., HAYNER, *supra* note 37, at 15–20.

⁵⁴ *Id.* at 14. Examples include those in Chile, Argentina, El Salvador, Guatemala, and South Africa. *Id.* at 14–15.

⁵⁵ *Id.* at 24–25 ("The most straightforward objective of a truth commission is sanctioned fact-finding: to establish an accurate record of a country's past, clarify uncertain events, and lift the lid of silence and denial from a contentious and painful period of history.").

⁵⁶ Carrie J. Niebur Eisnagle, Note, *An International "Truth Commission": Utilizing Restorative Justice as an Alternative to Retribution*, 36 VAND. J. TRANSNAT'L L. 209, 222 (2003). Similar to this notion is that "truth commissions are often implemented in states struggling to create a fundamental change in the state's current power structure and governance in favor of a more democratic structure, because a truth commission can

governments are historically more favorable to human rights than military dictatorships, communist governments, and other totalitarian regimes. As a result, "as more countries adopt a more democratic form of government, there has been a corresponding increase in the utilization of truth commissions to help ease these transitions."⁵⁷

Advocates of truth commissions believe that truth commissions provide transitional states with a better alternative than traditional criminal trials because truth commissions are better equipped to respond to the individual needs and interests of victims.⁵⁸ In this way, truth commissions contribute to justice and provide accountability for perpetrators of human rights abuses.⁵⁹ Proponents argue that truth commissions are able "to outline institutional responsibility" and recommend appropriate state reforms to ensure that past mistakes are not repeated.⁶⁰

C. The South African Truth and Reconciliation Commission: A Framework for How a Truth and Reconciliation Can Serve as an Effective Alternative in Post-Conflict Regions

Although many truth commissions in the past failed in some respect, the recent truth commission established in South Africa provides a shining example of the potential benefits of this approach to restoring peace and facilitating transition in post-conflict societies.⁶¹ The South African TRC has

be used to help emphasize the importance of human rights." *Id.* at 222–23 (internal citations omitted).

⁵⁷ *Id.* at 223.

⁵⁸ HAYNER, *supra* note 37, at 28. Hayner argues that the "fundamental difference" between a criminal trial and a truth commission is that truth commissions respond to the needs of the victim, whereas trials focus only on the acts of the perpetrator. *Id.* Truth commissions "take testimony from a broad array of witnesses, victims, and survivors, and consider all of these accounts" in evaluating the conflict. *Id.* This allows victims to feel as though they are more central to the process. Therefore, "[b]y listening to victims' stories . . . commissions effectively give victims a public voice and bring their suffering to the awareness of the broader public." *Id.*

⁵⁹ *See id.* at 29.

⁶⁰ *Id.* ("[T]ruth commissions are well positioned to evaluate the institutional responsibilities for extensive abuses, and to outline the weaknesses in the institutional structure or existing laws that should be changed to prevent abuses from reoccurring in the future.").

⁶¹ Sir William Deane, Governor-General of the Commonwealth of Australia, Address at the Presentation of the Sydney Peace Prize to Archbishop Desmond Tutu (Nov. 26, 1999), at <http://www.gg.gov.au/speeches/textonly/speeches/1999/991126.html>. "Through his chairmanship of the Truth and Reconciliation Commission, Desmond Tutu

emerged as a novel way to “deal with the past without dwelling on it, and to establish the moral foundation from which to build a truly new [State].”⁶²

Amidst overwhelming domestic and international political pressure, the apartheid regime that controlled South Africa’s government for thirty years surrendered power in 1993.⁶³ The former government and the new political parties all participated in drafting the 1993 Interim Constitution of South Africa.⁶⁴ A critical provision in the new Constitution was the promise of amnesty to several leaders of the apartheid regime who had participated in South Africa’s political war.⁶⁵ However, this amnesty was conditional on an appearance before a truth commission to be established in the future. Although this provision received severe public opposition in the South African community, this component proved to be the key for a peaceful transition of power.⁶⁶

In 1995, the South African Parliament established the South African TRC to address the lingering questions from the old regime.⁶⁷ The South

has provided to the world a shining example of peace-making, in the fullest sense of the term, through a process of restorative justice, reconciliation and healing.” *Id.*

⁶² Daly, *supra* note 46, at 84 (internal citation omitted).

⁶³ Marianne Geula, Note, *South Africa’s Truth and Reconciliation Commission as an Alternative Means of Addressing Transnational Government Conflicts in a Divided Society*, 18 B.U. INT’L L.J. 57, 60–62 (2000).

⁶⁴ *Id.* at 61.

⁶⁵ Kamali, *supra* note 19, at 119.

⁶⁶ The new South African government recognized that “people in South Africa still had to live and work with each other after the change in government, [and that the proposed] process for dealing with the human rights violations committed during the apartheid years needed to assign accountability,” but not in a way that would continue to divide the country. Paul Lansing & Julie C. King, *South Africa’s Truth and Reconciliation Commission: The Conflict Between Individual Justice and National Healing in the Post-Apartheid Age*, 15 ARIZ. J. INT’L & COMP. L. 753, 761 (1998). Thus, “success in the constitutional negotiations depended, to a large degree, on making a deal with the previous regime, and Nuremberg-type trials were not an option if the country was to reach democratic elections without a coup or chaos.” *Id.* (internal citations omitted).

⁶⁷ The goals of the South African TRC, as stated in the Preamble of the Promotion of National Unity Act of 1995, were “to provide for the investigation and the establishment of as complete a picture as possible of the nature, causes[,] and extent of gross violations of human rights” committed by the state during the apartheid era. Promotion of National Unity and Reconciliation Act 34 of 1995 (Preamble), *available at* <http://www.doj.gov.za/trc/legal/act9534.htm> (last updated Apr. 10, 2003) [hereinafter Reconciliation Act].

African TRC had three primary goals: (1) to grant amnesty to apartheid officials who fully disclosed the truth surrounding their violations; (2) to establish “and mak[e] known the fate or whereabouts of victims” and restore human and civil dignity to such victims “by granting them an opportunity to relate their own accounts of the violations of which they [were] victims;” and (3) to make “recommendations of measures to prevent the future violations of human rights.”⁶⁸

The South African TRC established three committees to aid in achieving its goals; the Human Rights Violation Committee,⁶⁹ the Reparations and Rehabilitation Committee,⁷⁰ and the Amnesty Committee.⁷¹ The Amnesty Committee was responsible for processing applications for amnesty and making determinations with regard to whether or not the committee should grant amnesty to perpetrators.⁷² Generally, if the perpetrator committed the human rights abuses with political motivations and fully disclosed all relevant facts related to the violations, full amnesty would be given.⁷³

Although the commission was not a trial, proponents of the South African TRC contended that the amnesty process did result in the perpetrators accepting some level of accountability, despite its lack of

In the new South African government’s view, this commission could “provide victims of past human rights abuses an opportunity to relate the violations they suffered and to be given reparations to rehabilitate them.” Kamali, *supra* note 19, at 120.

⁶⁸ Lansing & King, *supra* note 66, at 761–62.

⁶⁹ The Human Rights Violation Committee was responsible for conducting victim hearings—this committee took more than 21,000 victim statements. Richard John Galvin, *The Case for a Japanese Truth Commission Covering World War II Era Japanese War Crimes*, 11 TUL. J. INT’L. & COMP. L. 59, 99 (2003).

⁷⁰ The Reparations and Rehabilitation Committee assisted in the reparations process which under the Reconciliation Act mandated that reparations be paid to all designated victims. Reconciliation Act, ch. 2, § 4(f), ch. 5, § 26(3).

⁷¹ The Amnesty Committee was the committee principally responsible for making the amnesty determinations. Reconciliation Act, ch. 4, § 21(1).

⁷² Lansing & King, *supra* note 66, at 764–65. The Amnesty Committee considered six criteria when it reviewed an amnesty application:

(1) the motive of the offender; (2) the context and circumstances of the act, including whether the act was political; (3) the legal and factual nature of the offense; (4) the objective of the act, in particular whether it was politically motivated and whether it was directed against the State or an individual; (5) whether the offense was committed on behalf of a political organization; (6) the proportional relationship between the act and any political objective.

Id.

⁷³ *Id.*

traditional punishment—incarceration.⁷⁴ First, the South African TRC did not provide for a blanket amnesty to human rights violators, as the world has seen on many occasions in post-conflict states.⁷⁵ Furthermore, the South African TRC held public hearings in which those seeking amnesty had to publicly apologize for their acts as a condition to amnesty.⁷⁶ The intent and belief of the commission was that the social sanctions of public disapproval, ostracism, shame, embarrassment, and disadvantage could amount to a serious punishment in itself.⁷⁷

A limited Iraqi truth commission would gain valuable insight from following certain aspects of the South African model. First, under the South African model, amnesty is given only after a full disclosure of the truth. Iraqi commission officials need to investigate and cross-reference versions to ensure that the commission is receiving an accurate and comprehensive version of the events that took place. Second, in the South African model, amnesty is given only for politically motivated crimes. This is a good threshold for what violations will and will not receive amnesty, and the Iraqi government should use a similar provision in the formation of their commission. Although “politically motivated” is loosely defined, this provision is critical to ensure that perpetrators of violence who lacked any political motivations whatsoever do not receive amnesty. Finally, a public

⁷⁴ Neil J. Kritz, *Accountability for International Crime and Serious Violations of Fundamental Human Rights: Coming to Terms With Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights*, LAW & CONTEMP. PROB., Autumn 1996, at 141. Although truth commissions cannot be viewed as a substitute for prosecutions, commissions do serve many of the same purposes. Truth commissions:

- (1) provide[] the mandate and authority for an official investigation of past abuses;
- (2) permit[] a cathartic public airing of the evil and pain that has been inflicted, resulting in an official record of the truth; (3) provide[] a forum for victims and their relatives to tell their story, have it made part of the official record, and thereby provide a degree of societal acknowledgment of their loss; and (4) in some cases, establish[] a formal basis for subsequent compensation of victims and/or punishment of perpetrators.

Id.

⁷⁵ Rather, the South African TRC “offered [a] pragmatic resolution of the core dilemma of transition, namely, the problem of attributing individual responsibility for systematic wrongs perpetrated under repressive rule.” Anurima Bhargava, Note, *Defining Political Crimes: A Case Study of the South African Truth and Reconciliation Commission*, 102 COLUM. L. REV. 1304, 1307–08 (2002) (internal citation omitted).

⁷⁶ *Id.* at 1308.

⁷⁷ *Id.* These hearings also educated the citizenry of the country’s past and aided in the reconciliation process between black and white South Africans. See *id.*

reprimand and apology is a fair balance between providing a sense of retribution to the victims and their families and promoting the State's larger goals of reconciling the community and deterring future violence.

IV. AN ANALYSIS OF THE EFFICACY OF TRADITIONAL MODELS OF JUSTICE APPLIED TO POST-CONFLICT REGIONS

Sadly, the twentieth century has a lengthy record of incidents of gross human rights abuses.⁷⁸ In many cases, the perpetrator of the violence is the state and the victims are certain groups living within the state, namely political dissenters, ethnic and religious minorities, women, or other minorities.⁷⁹ In the 1930s and 1940s, Adolf Hitler and members of his Third Reich transported millions of Jews living in Germany and throughout Europe to death camps.⁸⁰ The generally accepted estimate is that Hitler and his government ordered the extermination of roughly six million Jews during his reign.⁸¹

Incidents of human rights atrocities did not end with Germany's defeat in World War II. In the 1970s and 1980s, Chilean dictator Augusto Pinochet ordered the detainment, torture, and execution of thousands of Chilean citizens.⁸² Pinochet instigated this violence as part of an international conspiracy, named Operation Condor, to track down and dispose of his political opponents.⁸³ More recently, during a three-month period in 1994, Hutu leaders in Rwanda coordinated and incited the brutal murder of an

⁷⁸ See Catherine Powell, Symposium in Celebration of the Fiftieth Anniversary of the Universal Declaration of Human Rights, *Introduction: Locating Culture, Identity, and Human Rights*, 30 COLUM. HUM. RTS. L. REV. 201, 218 (1999).

⁷⁹ *Id.* Conflicts are increasingly occurring within states, rather than between them. *Id.* These internal conflicts are often a result of religious and ethnic differences, and the victims in these conflicts are frequently targeted "because of their membership in particular religious, ethnic, racial, linguistic, or indigenous groups." *Id.*

⁸⁰ See Max Frankel, *150th Anniversary: 1851-2001; Turning Away From the Holocaust*, N.Y. TIMES, Nov. 14, 2001, at H9.

⁸¹ Michael J. Bazyler, *Austin Owen Lecture: Litigating the Holocaust*, 33 U. RICH. L. REV. 601, 602 (1999).

⁸² See, e.g., Jorge Correa S., *Dealing with Past Human Rights Violations: The Chilean Case After Dictatorship*, 67 NOTRE DAME L. REV. 1455, 1466-68 (1992).

⁸³ William J. Aceves, *Liberalism and International Legal Scholarship: The Pinochet Case and the Move Toward a Universal System of Transnational Law Litigation*, 41 HARV. INT'L L.J. 129, 160 (2000).

estimated 800,000 Tutsi.⁸⁴ Nearly ten percent of Rwanda's total population lost their lives during this three-month period in a genocide carried out by their fellow countrymen.⁸⁵ Sierra Leone,⁸⁶ the Balkans,⁸⁷ Cambodia,⁸⁸ and East Timor⁸⁹ are all states that fell victim, in the last decade, to massive tolls of human rights violations. Each of the above situations was unique, but

⁸⁴ Mark A. Drumbl, *Rule of Law Amid Lawlessness: Counseling the Accused in Rwanda's Domestic Genocide Trials*, 29 COLUM. HUM. RTS. L. REV. 545, 547 (1998).

⁸⁵ *Id.*

⁸⁶ Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 AM. J. INT'L L. 7, 28 (2001). Since 1991, a civil war between the Sierra Leone government and the Liberia-backed rebel Revolutionary United Front (RUF) has crippled the country. *See id.*

In a ruthless campaign aimed at profiting from Sierra Leone's vast gold and diamond reserves, the RUF attempted to win the "allegiance" of people through the exhaustive employment of terror. RUF tactics included the abduction and forced recruitment of children and the use of narcotics to turn them into effective killers, often against their own family members. Widespread killing, rape, and torture were common, and those suspected of supporting the government—as well as their children and infants—had limbs amputated in a form of "rule by terror."

Id.

⁸⁷ David M. Kresock, "Ethnic Cleansing" in the Balkans: *The Legal Foundations of Foreign Intervention*, 27 CORNELL INT'L L.J. 203, 228 (1994). When the former Republic of Yugoslavia fell apart in the early 1990s, conflict broke out. *Id.* at 223. Serious human rights abuses followed, including the following unofficial reports: an "August 21, 1992, massacre of over 200 Muslim men and boys by Serb police in the Vlasica mountains in Central Bosnia"; the "murder of 2,000 to 3,000 Muslim men, women, and children in May and June of 1992 by Serb irregulars at a brick factory and pig farm near Brko"; the "May 18, 1992, murder of 56 Muslims by Serb militiamen in Grbavci"; the "regular, daily execution of 20 Muslim prisoners held by Serbs at the Omarska Camp in central Bosnia"; "Serb soldiers breaking the necks of Muslim children abandoned in a hospital"; the "November 20, 1991 mass killing of 300 Muslims by Serb soldiers outside Vukovar"; and "the execution of as many as 5,000 Muslims in late May of 1992 by Serbian forces in the town of Kozarac." *Id.*

⁸⁸ *See, e.g.,* Steven R. Ratner, *The United Nations Group of Experts for Cambodia*, 93 AM. J. INT'L L. 948, 948 (1999).

⁸⁹ Tania Voon, *Closing the Gap Between Legitimacy and Legality of Humanitarian Intervention: Lessons From East Timor and Kosovo*, 7 UCLA J. INT'L L. & FOREIGN AFF. 31, 57 (2002). In a report issued by the International Commission of Inquiry, the commission found that Indonesian military groups engaged in "gross violations of human rights and breaches of humanitarian law which varied over time and took the form of systematic and widespread intimidation, humiliation and terror, destruction of property, violence against women and displacement of people." *Id.*

when the violence in these regions subsided, a common question arose: What should happen with the perpetrators of these human rights crimes?⁹⁰

A. International Criminal Tribunals

One traditional method of dealing with perpetrators of human rights violations is a criminal trial. Over the last century, individual states and the international community have experimented with both international criminal tribunals and domestic trials.⁹¹ Over the last few decades, "there has been a significant increase in the number of requests for international assistance to enforce international humanitarian law through criminal prosecutions."⁹² The Nuremberg Tribunal, organized by the Allied Powers after World War II, marked the first time the modern world united to address and condemn the perpetrators of international human rights abuses.⁹³ The Nuremberg Tribunal's precedent paved the way for the creation of several, more recent, multilateral international tribunals to prosecute those who violate

⁹⁰ See Chandra Lekha Sriram, *Revolutions in Accountability: New Approaches to Past Abuses*, 19 AM. U. INT'L L. REV. 301, 426–29 (2003).

⁹¹ As stated by international legal scholar Mark Drumbl:

International criminal law aspires to prosecute alleged perpetrators of grievous human rights abuses. These prosecutions are to take place adversarially in criminal trials. If these alleged perpetrators are in fact found guilty, they are to be punished. Many international treaties and decisions involving state obligations with respect to gross violations of human rights speak of obligations to investigate, prosecute, and punish. As such, accountability is largely conflated with criminal process followed by punishment, which, under international criminal law, overwhelmingly takes the form of incarceration. Since accountability is cast as a prerequisite for justice, the criminal trial and the jailhouse become causally connected to justice as well.

Mark A. Drumbl, *Toward a Criminology of International Crime*, 19 OHIO ST. J. ON DISP. RESOL. 263, 264 (2003). The proliferation of institutions, such as the International Criminal Court, the ad hoc tribunals for Rwanda and the former Yugoslavia, and special courts in Sierra Leone and Cambodia demonstrate the international push for addressing international crimes with criminal trials. *Id.* at 265.

⁹² Daryl A. Mundis, *New Mechanisms for the Enforcement of International Humanitarian Law*, 95 AM. J. INT'L L. 934, 934 (2001).

⁹³ Gerry J. Simpson, *Conceptualizing Violence: Present and Future Developments in International Law: Panel II: Adjudicating Violence: Problems Confronting International Law and Policy on War Crimes and Crimes Against Humanity: Didactic and Dissident Histories in War Crimes Trials*, 60 ALB. L. REV. 801, 804–05 (1997); see also Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers and Charter of the International Military Tribunal, Aug. 8, 1945, 82 U.N.T.S. 279.

international humanitarian law norms,⁹⁴ namely, the United Nations Security Council's 1993 establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY)⁹⁵ and the United Nations Security Council's 1994 establishment of the International Criminal Tribunal for Rwanda (ICTR).⁹⁶

Supporters of the tribunals in Yugoslavia and Rwanda argue that "the Security Council and the international community must now accept the challenge and create the precedent for a more rigorous enforcement of humanitarian law."⁹⁷ The gravity of the human rights abuses and their unsavory reputation could mean that a failure to punish would significantly compromise the legitimacy of international humanitarian norms.⁹⁸ Advocates of international tribunals believe that international tribunals develop an "unprecedented jurisprudence of international humanitarian law."⁹⁹ In their

⁹⁴ See John Quigley, *Soviet Influences on International Criminal Law in the Nuremberg Era*, 7 CRIM. L.F. 447, 447-48 (1996) (book review).

⁹⁵ Sean D. Murphy, *Developments in International Criminal Law: Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia*, 93 AM. J. INT'L L. 57, 57 (1999).

⁹⁶ *Statute of the International Criminal Tribunal for Rwanda*, U.N. SCOR, 49th Sess., 3453d mtg. at 15, art. 23(3), U.N. Doc. S/Res/955 (1994), available at <http://www.ictr.org/ENGLISH/basicdocs/statute.html> (last visited Oct. 1, 2004).

⁹⁷ Theodor Meron, *The Case for War Crimes Trials in Yugoslavia*, FOREIGN AFF., Summer 1993, at 122, 135. In another piece Meron wrote, "The credibility of the international system of justice requires prosecutions for atrocities everywhere . . ." Theodor Meron, *War Crimes in Yugoslavia and the Development of International Law*, 88 AM. J. INT'L L. 78, 79 n.2 (1994).

⁹⁸ Lucas W. Andrews, Comment, *Sailing Around the Flat Earth: The International Tribunal for the Former Yugoslavia as a Failure of Jurisprudential Theory*, 11 EMORY INT'L L. REV. 471, 480-81 (1997).

⁹⁹ See, e.g., Murphy, *supra* note 95, at 95. Professor Murphy notes that prior to the ICTY's establishment the primary sources of international judicial precedent were the fifty-year-old decisions of the Nuremberg and Tokyo Tribunals. *Id.* Professor Murphy argues that the ICTY facilitates the growth of a corpus of international judicial decisions that significantly affect international humanitarian law. *Id.* These areas include:

[T]he central requirements for proving notorious crimes, such as "torture" and "crimes against humanity"; the attribution of crimes to superiors pursuant to theories of "command responsibility"; [and] the permissibility of defenses to such crimes, such as those based on reprisal or duress; the manner in which suspects may be apprehended, imprisoned, tried, and punished; the rights of suspects to counsel, cross-examination of witnesses, and exculpatory evidence; and the treatment of victims and witnesses.

Id. Professor Murphy argues that the ICTY's decision will affect the future work of international courts and national courts. *Id.* These "assessments will likely have a ripple

view, no matter how many human rights cases actually reach the trial stage, the very existence of the tribunals sends a powerful message.¹⁰⁰ In addition, “[t]heir statutes, rules of procedure and evidence, and practice stimulate the development of the law,” and “[t]he possible fear by states that the activities of such tribunals might preempt national prosecutions could also have the beneficial effect of spurring prosecutions before national courts for serious violations of humanitarian law.”¹⁰¹

Despite the perceived benefits of international criminal tribunals, the Security Council’s tribunals in Yugoslavia and Rwanda have been severely criticized.¹⁰² Some of the critics focus on the fact that several of the most notorious criminals have yet to be indicted, while others who the tribunals have indicted remain unpunished.¹⁰³ This problem is exacerbated by the fact that the Security Council members who established the tribunals will not authorize deployment of their troops to assist these regions with the arrest and prosecutions of wanted suspects hiding within these countries.¹⁰⁴

Opponents also argue that the tribunals, particularly in Yugoslavia, failed in their primary function of restoring peace to these regions.¹⁰⁵ Furthermore, the tribunals suffer from serious logistical, structural, and political concerns because “[t]heir lofty mandates have been tempered by the political contexts in which they were set and the climates in which they operate.”¹⁰⁶ Critics

effect on the development of both international law and national law outside the context of international humanitarian law.” *Id.* at 96.

¹⁰⁰ Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT’L L. 554, 555 (1995).

¹⁰¹ *Id.*

¹⁰² See, e.g., Makau Mutua, *From Nuremberg to the Rwanda Tribunal: Justice or Retribution?*, 6 BUFF. HUM. RTS. L. REV. 77, 87 (2000).

¹⁰³ See, e.g., Murphy, *supra* note 95, at 95. One glaring example is Slobodan Milošević. *Id.*

¹⁰⁴ Robert Marquand, *Bosnia War Crimes Judge Talks of Quitting: Wants West to Capture Big Fry*, CHRISTIAN SCI. MONITOR, Oct. 22, 1996, at 1.

¹⁰⁵ Murphy, *supra* note 95, at 95. Although the Security Council established the ICTY in 1993, its establishment did not prevent the commission of atrocities in Srebrenica in the summer of 1995 or in Kosovo in 1998. *Id.*

¹⁰⁶ See Mutua, *supra* note 102, at 87. A 1997 investigation by the United Nations found that the ICTR’s Registry “had no accounting system; that the tribunal had incomplete and unreliable financial records; unqualified staff; disregard of UN regulations; shortage of cells and courtrooms; lack of lawyers and investigators; lack of logistical, transport, and office equipment; and neglect of the tribunal by U.N. headquarters in New York.” *Id.* at 88–89. These obstacles, coupled with a lack of funding and poor infrastructure, have prevented the effective establishment of the ICTR and its work. *Id.* at 89; see also Craig Turner, *Rwanda War Crimes Tribunal Mismanaged*,

believe that the establishment of the international tribunals "was simply a cost-free effort by some governments to assuage their guilt about not intervening meaningfully in the former Yugoslavia prior to 1995,"¹⁰⁷ and in Rwanda prior to the genocide.¹⁰⁸ Underlying all of the opponent's arguments is the notion that the ICTY and ICTR raised serious questions of "fairness and political privilege," and "[n]o matter how successful the ad hoc tribunals may be at dealing with specific crises situations, their selective creation and narrow focus creates an impression of unfairness and unequal treatment."¹⁰⁹

While the purported intentions of the Security Council in establishing the tribunals in Yugoslavia and Rwanda are laudable in theory, in practice the tribunals suffered from significant flaws. The obstacles confronted by these tribunals indicate that an internationally mandated criminal tribunal for Iraq may not be the best solution. Insurmountable international pressure encompassed Allied Forces' efforts to prosecute Nazi war criminals after World War II; therefore, the Nuremberg Tribunal did not suffer from the same political, financial, and logistical restraints that its successors have faced. The unpopularity and political objection that stains the United States' war efforts in Iraq demonstrate that a proposed international criminal tribunal in Iraq would likely face significant international objection. This type of negative impetus could tremendously thwart an Iraqi tribunal's ability to operate effectively, and the legitimacy of such a tribunal could be highly suspect.

Furthermore, the use of international criminal tribunals in the last few decades has been in regions where the humanitarian abuses arose as a result of massive internal, ethnic conflicts. In these situations, victim-run national trials could give the appearance of vengeance rather than punishment, thus spurring further resentment and future violence. International criminal tribunals used in regions of internal conflict go further in creating the perception of legitimacy and assisting in the reconciliation of ethnic or

Report Says; Africa: The Problems Have Slowed Efforts to Prosecute Killers in Genocide, U.N. Says, L.A. TIMES, Feb. 13, 1997, at 8; John Goshko, *U.N. Probe Find Mismanagement, Waste in Rwanda War Crimes Tribunal*, WASH. POST., Feb. 13, 1997, at A20.

¹⁰⁷ Murphy, *supra* note 95, at 95.

¹⁰⁸ Mutua, *supra* note 102, at 82 ("If the former Yugoslavia suffered from international inaction, the world seemed asleep, uncaring, as ominous clouds gathered over Rwanda, igniting a murderous inferno as they touched the ground.").

¹⁰⁹ Bartram S. Brown, *Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals*, 23 YALE J. INT'L L. 383, 386 (1998).

religious groups.¹¹⁰ However, the Iraqi population is overcoming decades of oppression by a totalitarian regime, and not an internal civil war. As noted above, there is strong voice from within Iraq to deal with members of Saddam's government internally; therefore, some type of domestic solution, as opposed to an international tribunal, may be a more appropriate solution in Iraq.

B. National Trials

Domestic or national trials are another option for post-conflict states addressing internal humanitarian abuses.¹¹¹ Many of the problems associated with domestic trials arise from the fragile condition of a majority of these regions in the aftermath of conflict.¹¹² Oftentimes, a state's entire judicial system is either too compromised, too weak, or simply lacking the infrastructure or resources to conduct large-scale criminal trials.¹¹³ Criminal prosecutions are also incredibly time-consuming and expensive.¹¹⁴ In many post-conflict regions, the potential number of arrests and prosecutions could

¹¹⁰ But see Laura A. Dickinson, Note, *The Promise of Hybrid Courts*, 97 AM. J. INT'L L. 295, 302 (2003). "[I]n light of the continuing ethnic tensions within the region, the ICTY was established at The Hague, far removed from the scene of the atrocities, and the court was staffed by international judges and staff. However, the lack of connection to local populations has been problematic." *Id.* Similarly, as a result of the ongoing violence in Iraq, an international tribunal established in Iraq may be forced to operate from a remote location. This fact could negatively affect the legitimacy of an international tribunal in the eyes of the Iraqi people.

¹¹¹ See, e.g., Kritz, *supra* note 74, at 132.

¹¹² See generally Wendy S. Betts & Gregory Gisvold, *Conflict Mapping: Innovation in International Responses in Post-Conflict Societies*, HUM. RTS. BR., Spring 2003, at 24.

¹¹³ Christopher J. Roederer, "Living Well is the Best Revenge"—If One Can: An Invitation to the Creation of Justice Off the Beaten Path, 15 S. AFR. J. HUM. RTS. 75, 94 (1999).

¹¹⁴ In South Africa, the government asked the citizenry how important it was for them to prosecute the leaders of the apartheid regime given that the 12 million rand (approximately U.S. \$1.3 million) in taxpayer-supported court costs that were spent to prosecute the former Minister of Defense yielded an acquittal. See *The Moral Foundations of Truth Commissions*, in TRUTH V. JUSTICE: THE MORALITY OF TRUTH COMMISSIONS 23, at 77 (Robert I. Rothberg & Dennis Thompson eds., Princeton 2000). The costs states would incur in prosecuting every criminal case would be extraordinary, and oftentimes these funds are desperately needed elsewhere. See also Daly, *supra* note 46, at 104 ("Punishment for wrongs is important, but so are electricity, medical care, jobs programs, education, [and] housing.").

be in the thousands.¹¹⁵ The majority of post-conflict states have extremely limited prison space and an insufficient number of personnel to operate the prisons.¹¹⁶ Furthermore, this caseload would overwhelm state judiciaries' already limited infrastructure, resulting in overbooked dockets,¹¹⁷ gratuitous plea bargains, and, therefore, minimal accountability for many significant criminals.¹¹⁸

Assuming a post-conflict state did have the physical infrastructure and human capital to conduct extensive domestic trials, there are other arguments against a state's use of domestic trials in these situations. For one, domestic trials do not provide a comprehensive version of the truth.¹¹⁹ Establishing a full record of the truth surrounding the motives and actual commission of the human rights abuses provides a necessary tool for new governments in post-conflict states.¹²⁰ A full account of the truth can facilitate the victims'

¹¹⁵ Mark A. Drumbl, *Punishment, Postgenocide: From Guilt To Shame To Civis In Rwanda*, 75 N.Y.U. L. REV. 1221, 1286 (2000). "The Rwandan government has, as part of its domestic public policy, opted for extensive judicial prosecution and incarceration as the principal device to promote the rule of law, order, and, purportedly, national reconciliation in postgenocidal Rwanda." *Id.* This policy resulted in the detainment of approximately 125,000 individuals by 1999. *Id.*

¹¹⁶ In 1999, in Rwanda, there were approximately 125,000 prisoners in Rwandan jails designed to hold a maximum of 15,000. *Id.* Undoubtedly, government resources needed for prisoners' food and other basic needs could be used elsewhere by the state. *See id.*

¹¹⁷ In Rwanda, for example:

The sheer bulk of genocide suspects and cases due for trial has placed severe strain on Rwanda's criminal justice system which is already crippled by poor infrastructure and the death of professionals during the genocide. Rwanda's prisons are heavily congested, and the cost of feeding and clothing prisoners is a drain on the economy.

The lack of an adequate number of prosecutors, judges, and lawyers to try the cases exacerbates the already bad situation. At the present rate, it would take over 200 years if Rwanda was to rely on the conventional court system to deliver justice.

Official website of the Government of Rwanda, at <http://www.rwanda1.com/-government/index.html>.

¹¹⁸ *See* The Human Rights Center and the International Human Rights Law Clinic et al., *Justice, Accountability and Social Reconstruction: An Interview Study of Bosnian Judges and Prosecutors*, 18 BERKELEY J. INT'L L. 102, 109 (2000).

¹¹⁹ Daly, *supra* note 46, at 103. The problem with the traditional criminal justice system is that, because of the "limited scope of each trial's inquiry" and the "manipulation of rules of evidence that govern the release of information," trials do not provide a comprehensive version of the truth. *Id.*

¹²⁰ Mary Ellen O'Connell, Symposium on Method in International Law, *New International Legal Process*, 93 AM. J. INT'L L. 334, 342 (1999). "[T]ruth commissions

healing process (reconciliation) and help the new government prevent future violence (deterrence).¹²¹

Proponents of this view argue that domestic trials are unlikely to achieve a state's goals of reconciliation and deterrence.¹²² Public trials are inherently adversarial; therefore, large domestic trials could cause extreme tension and resentment in ethnically, religiously, or politically divided states,¹²³ especially in states where sympathizers of the former government or controlling group continue to live these states.¹²⁴ Nor do the critics believe that domestic trials serve a state's goal of deterrence. Domestic trials do not identify the source(s) of the problem that led to the state-sponsored crimes or civil strife.¹²⁵ If the new government is unable to determine the source of the past violence, it will be difficult for the state to take measures that would prevent similar conduct from occurring in the future.¹²⁶

Despite the problems inherent with large-scale domestic trials in post-conflict states, there are strong arguments as to why domestic trials are

'are usually designed not to inflict legal punishment but as "a kind of non-adversarial process of re-establishing democratic justice by exposing the truth,"' which will in turn foster national reconciliation. *Id.* (citations omitted).

¹²¹ See José E. Alvarez, *Rush to Closure: Lessons of the Tadic Judgment*, 96 MICH. L. REV. 2031, 2100 (1998).

¹²² See, e.g., Daly, *supra* note 46, at 105–06. Daly argues that trials do not further national reconciliation because of their inherently adversarial nature. *Id.* at 105. Trials "reinforce the power that the new regime wields over adherents of the old." *Id.* at 106. Daly argues that trials separate members of these societies and they fail to bring people together. See *id.* In Daly's opinion, criminal trials are also unlikely to solve the state's problem of deterring future violence. According to this theory, criminal trials do not address the "causes of the wrong"; rather, their "primary concern is to remove it from society, not to understand it." *Id.* Daly argues that in situations involving mass atrocities, the wrong is "woven into the fabric of society" and its "etiology must be understood and treated." *Id.*

¹²³ See MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 26 (1998).

¹²⁴ See Daly, *supra* note 46, at 105–06. Public trials could be interpreted as the new government exhibiting their power and authority over the old regime, which could potentially lead to future resentment and conflict in these regions.

¹²⁵ *Id.* A corollary to this notion is that domestic trials do not expose the "state of mind" of the state or the individual perpetrators of the violence, which makes it difficult for new governments to adopt strategies that would prevent the violence from reoccurring in the future. See *id.*

¹²⁶ *Id.* at 105. Traditional criminal trials focus on individual responsibility and accountability. See *id.* "In transitional societies rife with massive violations of human rights, however, crime is the norm. It is not sufficient to remove an isolated offender, even a leader; rather, it is necessary to treat, and transform, the society as a whole." *Id.*

necessary, namely to ensure individual criminal responsibility.¹²⁷ Some argue that, if conducted effectively, domestic trials are the most efficient means for achieving a state's goals of reconciliation and deterrence.¹²⁸ To be successful, domestic trials must be open to public scrutiny and provide a full accounting of the former regime's criminal conduct.¹²⁹ Furthermore, each domestic tribunal must be unique and tailored to meet the needs of the particular population in question.¹³⁰

Prosecution of human rights crimes before domestic courts can serve important purposes.¹³¹ Domestic trials can "enhance the legitimacy and

¹²⁷ See, e.g., Miriam J. Aukerman, *Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice*, 15 HARV. HUM. RTS. J. 39, 42–43 (2002). Many countries believe prosecutions are necessary to redress criminal activity. See *id.* "[I]n the United States, there is a debate about whether offenders should be punished in prisons or rehabilitated in half-way houses; whether or not harsh sanctions have an appreciable deterrent effect; and whether or not reconciliation programs can be attached effectively to prosecutions." *Id.* Although these disagreements arise, "in the West the determination of individual culpability through prosecution is commonly regarded as necessary to redress criminal actions." *Id.* at 42. In the United States, there is a "widely held faith in prosecution—whether the goal is punishment or deterrence, condemnation or rehabilitation." *Id.*

¹²⁸ M. Cherif Bassiouni, *Combating Impunity for International Crimes*, 71 U. COLO. L. REV. 409, 410 (2000). Professor Bassiouni argues that, "Throughout history, societies have resorted to the institutionalization of criminal justice as a means to achieve public order insofar as that type of justice removes the need for individual vengeance and avoids a continuing cycle of violence." *Id.* This experience "reveals that punishment is a deterrent, provided that the chances for successful prosecution and conviction are high and that the penalty is more costly to the perpetrator than the benefit of committing the crime." *Id.* Therefore, criminal trials can reconcile post-conflict communities and provide for an effective deterrent. See *id.*

¹²⁹ Major Jeffrey L. Spears, *Sitting in the Dock of the Day: Applying Lessons Learned from the Prosecution of War Criminals and Other Bad Actors in Post-Conflict Iraq and Beyond*, MIL. L. REV. 96, June 2003, at 153. If trials are monitored to ensure that they provide forums of justice and not of vengeance, trials of human rights abusers before domestic forums "can further the interests of justice and complement the ultimate goal of the reconciliation of the belligerents and the restoration of peace." *Id.* Providing fair forums is especially important "if the society is composed of diverse populations that have never integrated into a coherent society." *Id.* at 155.

¹³⁰ See *id.* at 188.

¹³¹ See *id.* at 155. Major Spears argues that criminal trials can serve both the domestic needs of the victorious parties to the conflict and the civilian populations who were victims of the former state's violence. *Id.* Trials serve the "domestic needs of the victorious parties to the conflict by subjecting to justice the principals of an unlawful war characterized by mass atrocities. This process of accountability—as with a traditional criminal case—can reduce the animosity of the civilian populations harmed by the

credibility of a fragile new government, demonstrating its determination to hold individuals accountable for their crimes.”¹³² Domestic trials can provide “an important focus for rebuilding the domestic judiciary and criminal justice system, establishing local courts as a credible forum for the redress of grievances in a nonviolent manner.”¹³³ Finally, domestic courts can be more sensitive to the nuances of local culture.¹³⁴

Domestic trials must be used in conjunction with the truth commission in Iraq. It is simply impracticable for the Iraqi government to transition from 25 years of totalitarian rule to a democracy while also trying to prosecute the thousands of potential suspects living in Iraq. Iraq does not have the human capital (*i.e.*, lawyers, judges, prosecutors, court personnel) or physical infrastructure (jails and courts) to realistically conduct these widespread prosecutions. However, there will be situations in which domestic trials are necessary. As discussed above, truth commissions assist a transitional state in its goals of reconciliation and deterrence. There are certain actors that cannot be deterred and certain crimes that cannot be reconciled. The Iraqi government needs to determine who these actors are and what crimes are irreconcilable and incorporate this in the establishment of the hybrid system.

C. Amnesties

Amnesties resulting from political compromise represent another method employed by post-conflict states to address past state-sponsored human rights violations.¹³⁵ Unfortunately, most attempts to prosecute individuals accused

unlawful acts of the principals.” *Id.* at 154. Furthermore, “[b]y fixing responsibility at the leadership level, the injured populations can receive the psychological benefits of the justice system, while the process prevents the return of the bad actors to power.” *Id.*

Trials can benefit the civilian populations as well. When trials are “conducted in an open forum calculated to develop a full accountability, the domestic population can understand the scope of the atrocities that played a part in the decision of the victors to go to war.” *Id.* Finally, in societies “that have not known the rule of law,” these people “can receive an introduction to a justice system governed by process rather than outcome.” *Id.*

¹³² Kritz, *supra* note 74, at 132–33.

¹³³ *Id.*

¹³⁴ Domestic trial, as opposed to international tribunals or other mechanisms for justice, “could be of greater and more immediate symbolic force because verdicts would be rendered by courts familiar to the local community.” *Preliminary Report of the Independent Commission of Experts Established in Accordance with Security Council Resolution 935*, U.N. SCOR, at 31 (1994).

¹³⁵ Dr. Kristin Henrard, *The Viability of National Amnesties in View of the Increasing Recognition of Individual Criminal Responsibility at International Law*, 8 MSU-DCL J. INT’L L. 595, 613 (1999).

of human rights crimes have not been as successful as the trials at Nuremberg. Defeat of an oppressive regime is not always as absolute as it was in World War II, and the majority of human rights violations arise out of internal, not international, conflicts.¹³⁶ In South Africa, El Salvador, and Chile for example, a peaceful transition of power required political compromises.¹³⁷ Before the leaders of these regimes agreed to relinquish power to the new governments, the former leaders demanded the new government grant them amnesty for their crimes as a condition to surrender.¹³⁸ These countries and many others over the last few decades viewed this compromise as a small price to pay for a peaceful transition of power and the prospect of a liberated state.¹³⁹

Although no one directly promotes the use of amnesties, many realize that political realities mandate their use by states under certain circumstances.¹⁴⁰ When oppressive regimes fall, the remnants of that regime

¹³⁶ See Daly, *supra* note 46, at 102. In the majority of situations, "victory is . . . wrested from the previous regime through tenuous military victory or cautious negotiation and bargaining." *Id.* Furthermore, "[i]n most instances, long-lasting and secure peace will only emerge with the involvement of multiple parties no one of which would typically accept massive prosecutions against it." *Id.*

¹³⁷ See generally Mark Gibney, *Decommunization: Human Rights Lessons from the Past and Present, and Prospects for the Future*, 23 DENV. J. INT'L L. & POL'Y 87, 114-19 (1994) (describing transition to democracy in several countries).

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ The arguments for and against domestic and international trials and amnesties represent the competing interests that are at stake when a new government assumes control. Consider the case of Chilean dictator Augusto Pinochet. See Michael J. Kelly, *The International Criminal Court: Case Studies "Ripe" for the International Criminal Court: Practical Applications for the Pinochet, Ocalan, and Libyan Bomber Trials*, 8 MSU-DCL J. INT'L L. 21, 23-24 (1999). Pinochet ruled Chile for 17 years. During this time, Pinochet tortured and executed thousands of political dissidents. *Id.* Amidst intense domestic and international pressure, Pinochet agreed to relinquish power and hold democratic elections. *Id.* A condition to this surrender, however, was the new government granting Pinochet amnesty for the crimes he committed during his reign. *Id.* This compromise infuriated many of the families of the tortured victims. *Id.* However, what truly was the new government's alternative?

Unfortunately, the new government in Chile cannot change the past or bring back the victims of Pinochet's violence. The new Chilean government had the opportunity to avoid further loss of life and the prospect of a democratically elected government in exchange for Pinochet and other leaders' amnesty. These inherent dilemmas are the reason many scholars are looking at truth and reconciliation commissions as a better alternative.

do not simply disappear.¹⁴¹ Members, sympathizers, and supporters of those regimes continue to live and work in these states, and new governments have to adopt solutions to these situations.¹⁴² This reality, inherent in internal conflicts, is largely what led to the development of the truth and reconciliation commission as an alternative means of addressing these situations.¹⁴³

The proposed hybrid system in Iraq recognizes that, to facilitate a peaceful transition to the new Iraqi government, some form of amnesty is essential. The new government will have a variety of social obstacles facing it, and the country as a whole would be better served if the new government's resources were not fully spent on fighting the remnants of Saddam's regime. The hybrid system does not grant the former oppressors blanket amnesties, which was typical in the past. Rather, in certain situations the truth commission grants amnesty in exchange for a full disclosure of the truth.

V. INTERNATIONAL LAW AND TRUTH COMMISSIONS

Putting aside for a moment the practical, political and theoretical arguments for or against the use of a truth commission in Iraq, there remains the question of whether an Iraqi truth commission would violate international law. Several developments during the last half century reveal an "ongoing process of (increasing) recognition of individual criminal responsibility for grave human rights violations under international law."¹⁴⁴ These developments and other advancements in the area of human rights appear to relay the message that the era of impunity for egregious human rights abuses

¹⁴¹ See Jennifer L. Balint, *Accountability for International Crime and Serious Violations of Fundamental Human Rights: The Place of Law in Addressing Internal Regime Conflicts*, 59 LAW & CONTEMP. PROBS., Autumn 1996, at 103, 108.

¹⁴² *Id.*

¹⁴³ Robert Meister, *Constitutions and 'Survivors Stories': Sojourners and Survivors: Two Logics of Constitutional Protection*, 3 U. CHI. L. SCH. ROUNDTABLE 121, 151 (1996).

¹⁴⁴ Henrard, *supra* note 135, at 600. The 1949 Geneva Conventions demonstrate that certain war crimes constitute "grave breaches" under international law and demand for individual criminal responsibility. *Id.* Furthermore, the 1948 Geneva Convention confirms that genocide is also a crime under international law, to which individual criminal responsibility attaches. *Id.* The 1973 U.N. Convention on the Suppression and Punishment of the Crime of Apartheid and the 1984 U.N. Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment provide additional bases for recognizing individual criminal responsibility for crimes against humanity and torture, respectively. *Id.* at 600-01. In light of these precedents, international law could prove to be a significant barrier for the establishment of an Iraqi truth commission.

is over.¹⁴⁵ Regardless of the benefits of truth commissions, the proponents of truth commissions cannot ignore the fact that individuals are essentially receiving immunity for crimes against international law.¹⁴⁶

International law accepts and indeed encourages amnesties in certain situations.¹⁴⁷ Amnesties are encouraged in "national" conflicts, where human rights abuses occurred as a result of an internal, political dispute.¹⁴⁸ Additional support for this idea lies in the fact that the United Nations, a body designed to protect and ensure human rights, routinely sponsors truth commissions in post-conflict regions.¹⁴⁹ However, it is an entirely different situation under international law when amnesty is proposed for grave breaches of international human rights law.¹⁵⁰ Amnesty cannot be legally

¹⁴⁵ *Id.* at 601. In 1996, pursuant to a U.N. General Assembly request, the International Law Commission published the 1996 Draft Code of Crimes Against the Peace and Security of Mankind (Draft Code). The Draft Code recognizes criminal responsibility for war crimes, crimes against humanity, genocide, and aggression. *Id.* at 601-02. The Tribunals in Rwanda and Yugoslavia established by the U.N. Security Council demonstrate further that the world is unwilling to tolerate certain behavior. *Id.* at 601-02. Finally, the International Criminal Court, which 139 countries ratified, is further evidence that sovereignty and other defenses will no longer protect international villains engaging in this type of conduct. *See, e.g.,* Major Lisa L. Turner & Major Lynn G. Norton, *Civilians at the Tip of the Spear*, 51 A.F. L. REV. 1, 33 n.187 (2001).

¹⁴⁶ *See, e.g.,* *Death Squad Leader in South Africa Gets Amnesty*, June 3, 2000, CHI. TRIB., at 12. The South African TRC granted amnesty to apartheid death squad commander Eugene de Kock for the killings of 14 people from 1983 to 1991 in South Africa and neighboring Botswana and Swaziland. *Id.*; *see also* Jeanne M. Woods, *Reconciling Reconciliation*, 3 UCLA J. INT'L L. & FOREIGN AFF. 81, 117 (1998).

¹⁴⁷ *See, e.g.,* Ronald C. Slye, *The Legitimacy of Amnesties Under International Law and General Principles of Anglo-American Law: Is a Legitimate Amnesty Possible?*, 43 VA. J. INT'L L. 173, 244 (2002).

¹⁴⁸ *See* Protocol II Additional to the 1949 Geneva Conventions, and Relating to the Protection of Victims of Noninternational Armed Conflicts, June 8, 1977, art. 6(5), 1125 U.N.T.S. 609, 614 ("At the end of hostilities, the authorities in power shall endeavor to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons relating to the armed conflict, whether they are interned or detained."). The purpose of amnesty "is to encourage gestures of reconciliation which can contribute to reestablishing normal relations in the life of a nation which has been divided." *Id.*

¹⁴⁹ *See* Dickinson, *supra* note 110, at 297-300 (Sierra Leone, Kosovo, East Timor).

¹⁵⁰ *See, e.g.,* Michael P. Scharf, *The Amnesty Exception to the Jurisdiction of the International Criminal Court*, 32 CORNELL INT'L L.J. 507, 515 (1999). Amnesty is inappropriate in situations where a grant of amnesty violates established international law set forth in treaties and conventions. *Id.* For example, one main purpose of the 1949 Geneva Conventions was to prevent certain grave breaches of international law when they arose as a part of armed conflict. *Id.* The Conventions did this by permitting

granted under international law if the crimes involve grave breaches of international law and arose out of an international conflict.¹⁵¹

Thus, the Iraqi truth commission could not legally grant amnesty to Saddam Hussein or other Iraqi leaders for the war crimes, genocide, or crimes against humanity they committed during the international armed conflicts in Kuwait or Iran.¹⁵² However, nothing under international law would appear to prohibit the new Iraqi government from implementing a truth commission to address the human rights atrocities members of Saddam's regime brought upon their own people.¹⁵³

The Iraqi truth commission's jurisdiction will be limited to human rights violations waged against citizens of Iraq with political motivations. Under international law, a perpetrator of rape, murder, or other serious crimes could legally be granted amnesty if he committed the act against an Iraqi citizen and it was done with political motivations. Therefore, the new Iraqi government has significant leeway under international law to determine which human rights violations are capable of receiving amnesty. This is a delicate line the new government must draw, and as discussed in the following Part, where this line is drawn could affect the perceived legitimacy of the entire truth commission.

VI. THE PERCEIVED LEGITIMACY OF TRUTH COMMISSIONS AS A FORM OF DISPUTE RESOLUTION

"Although in theory truth commissions are not antithetical to prosecution, in most cases a truth commission report leads very rarely to

universal jurisdiction to prosecute these crimes, and establishing for the ratifiers of the conventions an actual duty to prosecute these criminals. *Id.* at 515-16. Therefore, amnesty is inappropriate in situations constituting "grave breaches" of international law under the Geneva Conventions. *Id.* at 516.

¹⁵¹ *Id.* at 515.

¹⁵² See Michael Lafferty, *How to Make Iraq Answer for Atrocities; Human Rights Group Complains U.S. Misused Its Torture Reports*, ORLANDO SENTINEL, Mar. 10, 1991, at H1, available at LEXIS, News Library, Orsent File. Saddam Hussein and other Iraqi leaders are accused of serious human rights abuses during the Iran-Iraq war and the Iraqi invasion in Kuwait. *Id.*

¹⁵³ Opponents of amnesties (which would include truth commissions) maintain two main arguments as to why any and all amnesties granted for human rights abuses are inconsistent with international law. See Henrard, *supra* note 135, at 613. First, amnesties violate a victim's fundamental rights under international law; therefore, states should hold the perpetrators criminally accountable. See *id.* at 615. Second, "amnesties undercut efforts to establish a stable democracy that honors human rights and the rule of law." See Slye, *supra* note 147, at 182.

prosecutions, even when the identity of perpetrators is known, thus amounting to some kind of de facto amnesty.”¹⁵⁴ States like Iraq, at the transition point from an authoritarian regime to a democratic-style government, are often torn on how to balance the international and domestic pressure to prosecute with the need for national reconciliation and lasting peace.¹⁵⁵ Some argue that these concepts are fundamentally at odds with one another.¹⁵⁶ Whatever method a transitional state selects, a critical prerequisite is that the mechanism is perceived by the citizenry as legitimate.¹⁵⁷ The debate on which form of dispute resolution (truth commissions or trials) is more legitimate in post-conflict states often turns on one’s perspective of the competing notions of restorative and retributive justice.

A. Retributive Standpoint

The supporters of justice through prosecution and punishment argue that criminal trials further “moral and political renaissance and thus open the way for healing and national reconciliation.”¹⁵⁸ They also believe that criminal prosecutions deter future human rights violations by sending the message that certain conduct will not be tolerated.¹⁵⁹ Additionally, trials demonstrate a split from the old oppressive regime, which will help legitimize the new government in the eyes of its citizens.¹⁶⁰ If a state fails to prosecute its

¹⁵⁴ Henrard, *supra* note 135, at 632.

¹⁵⁵ See Villa-Vicencio, *supra* note 18, at 209–10 (2000).

¹⁵⁶ Hernard, *supra* note 135, at 632.

¹⁵⁷ Dickinson, *supra* note 110, at 301. “[P]erceived legitimacy is *not* the formal question of political legitimacy or democratic legitimacy that is often debated in political philosophy or international law theory.” *Id.* Perceived legitimacy focuses on legitimacy in a “more on-the-ground sense,” e.g., the factors that tend “to make the decisions of a juridical body acceptable to various populations observing its procedures.” *Id.*

¹⁵⁸ Henrard, *supra* note 135, at 634. Dr. Hernard’s view is that post-conflict states usually suffer from a history of human rights atrocities. When an oppressive regime falls and a new democratic government assumes power, that government must “reconstruct a morally just order.” *Id.* In these societies, many times the people living in these countries have suffered from oppression for so long that they are unable to distinguish what is in fact right from what is wrong. Punishing the perpetrators of wrongs can therefore lead to a “ritual cleansing process” whereby the citizens may learn what a truly moral order is. *Id.*

¹⁵⁹ Prosecutions remind and ratify certain societal norms that people are obliged to follow. *Id.*

¹⁶⁰ *Id.*

citizens' former abusers, not only might the new government lose its legitimacy to govern, but the failure to prosecute may result in vigilante justice.¹⁶¹

Some proponents of retributive justice for perpetrators of human rights abuses recognize that truth commissions do bring some reconciliation to a community and even some level of accountability for perpetrators of international crimes; however, in their view, such a commission can never serve as a complete substitute for criminal prosecutions.¹⁶² Certain people should not escape prosecution, regardless of the purported benefits of truth commissions.¹⁶³ The process of punishment of the wrongdoer "bring closure to victims of crime and their families."¹⁶⁴

Other commentators argue that truth commissions do not always provide an "effective remedy" to victims.¹⁶⁵ Certain international human rights

¹⁶¹ *Id.* at 634–35.

¹⁶² Christopher C. Joyner, *Redressing Impunity for Human Rights Violations: The Universal Declaration and the Search for Accountability*, 26 DENV. J. INT'L L. & POL'Y 591, 610 (1998). Professor Joyner believes that, despite the documented benefits of truth commissions, there are certain things truth commissions cannot fulfill:

Truth commissions do not produce full justice. They are not intended to. Nor will a truth commission reveal the whole truth. But, then again, it could not have been expected to. Reconciliation will stay incomplete, and so, too, will the hope for justice. Forgiveness, not justice, is the price deemed necessary if a truth commission is to help heal a society of the pain and suffering brought about by internal war and violent ethnic strife. And this poses the crux of the dilemma: Should those who perpetrate the most terrible of crimes escape punishment, at the price only of admitting their guilt and showing remorse? For the experience chosen by South Africa, the price of peace and reconciliation is "the truth" with amnesty. It is neither justice nor compensation. How well forgiveness actually works as a strategy for fostering political stability will only be seen in coming years.

Id.

¹⁶³ Spears, *supra* note 129, at 157. Major Spears argues that, as a matter of policy, a post-conflict system of justice must deny amnesty to two classes of individuals. *Id.* A grant of amnesty to these classes of perpetrators "could be construed as a ratification of their misconduct" and could damage the reconciliation process "by denying justice to the victims of the most brutal crimes." *Id.* The first class is state officials responsible for the purposeful use of weapons against civilian populations. *Id.* The second group is those individuals who directly participated in state-sponsored activities "calculated to terrorize the population of a country or engage in violations of the laws of war." *Id.* at 158.

¹⁶⁴ *Id.* at 156.

¹⁶⁵ Sherrie L. Russell-Brown, *Out of the Crooked Timber of Humanity: The Conflict Between South Africa's Truth and Reconciliation Commission and International Human Rights Norms Regarding "Effective Remedies"*, 26 HASTINGS INT'L & COMP. L. REV. 227, 231 (2003). Various human rights treaties, particularly the International Covenant on

tribunals have concluded that a victim's right to an effective remedy in cases of gross human rights violations mandates prosecution for these abuses.¹⁶⁶ Under this view, truth commissions that investigate and grant amnesty to perpetrators of gross humanitarian violations do not provide an "effective remedy" and are therefore illegitimate.¹⁶⁷

B. *Supporters of the Theory of Restorative Justice*

On the other end of the justice spectrum is the notion of restorative justice. Proponents of this theory of justice argue that forgiveness is a central component to a victim's healing process.¹⁶⁸ Forgiveness serves as a means for the victim to let go of "the power the offense and the offender may have had over the victim."¹⁶⁹ Furthermore, forgiveness prevents a cycle of violence and vengeance in societies with tarnished human rights records.¹⁷⁰ Truth commissions serve as an effective end for proponents of restorative justice.¹⁷¹ Truth commissions focus on the needs of victims by allowing them to speak about their suffering at hearings.¹⁷² Evidentiary rules do not curtail

Civil and Political Rights, the American Convention on Human Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms, statutorily create a victim's right to an "effective remedy" for violating the rights enumerated in those treaties.

¹⁶⁶ See Raquel Aldana-Pindell, *In Vindication of Justiciable Victims' Rights to Truth and Justice for State-Sponsored Crimes*, 35 VAND. J. TRANSNAT'L L. 1399, 1415 (2002); see also Russell-Brown, *supra* note 165, at 228–29.

¹⁶⁷ See Russell-Brown, *supra* note 165, at 261.

¹⁶⁸ Eisnagle, *supra* note 56, at 231 ("Without forgiveness, bitterness and a desire for vengeance often hold a person captive, preventing that person from healing and thus moving on, out of the cycle of violence.").

¹⁶⁹ *Id.* (citing HOWARD ZEHR, CHANGING LENSES 19–44 (1990)).

¹⁷⁰ Restorative justice advocate Paul McCold stated, "it is important to realize that blaming is fun. Anger is fun. Hatred is fun. And like any other pleasurable activity, it is habit forming—you get hooked on it." *Id.* at 232 (quoting Paul McCold, *Restorative Justice and the Role of Community*, in RESTORATIVE JUSTICE: INTERNATIONAL PERSPECTIVES 85, 86 (Burt Galway & Joe Hudson eds., 1996)). McCold's point is that, because of the addictive nature of violence, the "myth that punishment can prevent violence rarely seems to be challenged" leading to more attempts at punishment and further violence. *Id.* (quoting McCold, *supra*, at 85–86).

¹⁷¹ See Brenda V. Smith, *Battering, Forgiveness, and Redemption*, 11 AM. U. J. GENDER SOC. POL'Y & L. 921, 943 (2003).

¹⁷² *Id.*

victims' testimony; therefore, they are free to express feeling and emotion as they testify as to their suffering.¹⁷³

VII. MEETING IN THE MIDDLE: THE HYBRID PROPOSAL FOR POST-CONFLICT IRAQ

The world has yet to see a perfect solution for addressing past state-sponsored human rights abuse in a transitioning state. Due to the uniqueness of every post-conflict situation in the world, such a solution is impracticable. Oftentimes, the transition of power is a result of political compromise, resulting in amnesty grants to former leaders. In other situations, ethnic or religious divides are so extreme that an international body is the only practical and legitimate way a state can address those who violated international humanitarian law. Despite the difficulties these nations and the international community face in addressing these atrocities, there is a global sense of urgency to confront these criminals and protect international human rights.

The next few years will be a significant test for the new Iraqi government and its citizens. When the American military withdraws, Iraq will be left to its own devices to reconcile its society and build a lasting peace inside its borders. The challenges confronting Iraq appear insurmountable. War has ravaged Iraq for the last few decades, leaving both government and civil infrastructure in extreme disrepair. Iraq has an economy that has been isolated from the rest of the world for over a decade. The country is severely ethnically and religiously divided; therefore, the new government carries the burden of creating legitimate government representation for Iraq's various ethnic groups while striking a balance between the extremists and the secularists. Despite these significant barriers to the new government's success, Iraq must develop a solution for dealing with the thousands of Iraqis who participated in Saddam's regime's extensive human rights atrocities.

How can Iraq reconcile its people and preserve lasting peace within its borders? The Parts above outlined various models states have used over the years in their efforts to obtain similar goals. Some models have been more successful than others, and some have failed entirely. However, several lessons can be taken from these experiments and applied to the ultimate mechanism Iraq uses to address the criminals of Saddam's regime. Already in Iraq, there is a push to prosecute Saddam and other high-ranking officials of his regime. Therefore, the new Iraqi government must quickly devise a strategy for how it intends to address these individuals.

¹⁷³ *Id.*

The best solution for Iraq is a hybrid mechanism involving a truth commission and a domestic tribunal. Certain leaders of Saddam's Iraq must be prosecuted.¹⁷⁴ Saddam and others who engaged in grave human rights violations during the Iran-Iraq war and the invasion of Kuwait cannot escape redress. A failure to prosecute these individuals would be a violation of international law. Moreover, members of the regime who committed human rights atrocities not associated with political motives should also face prosecution. Defining what constitutes a political crime will be difficult for the Iraqi government. Does the persecution of religious or ethnic minorities truly constitute a "political crime?" Shi'a Muslims and Kurds all suffered tremendously at the hands of Saddam's regime, and amnesty for their persecutors could stir extreme resentment among these populations. These are the types of delicate considerations the government will have to make at the formation stage.

The reality is that Iraq is infested with less significant villains of Saddam's era. A truth commission modeled after that in South Africa would provide the most effective means of reconciling the citizens in Iraq, curtailing resentment, preserving the new government's legitimacy, and fostering a lasting peace. Members of Saddam's regime will continue to live and work amongst the victims of the persecution, and the government must adopt a strategy that addresses the victims' needs yet understands the delicateness of the situation in Iraq.

It seems unfathomable to grant many of these perpetrators amnesty. The potential benefits deriving from such a commission, however, far outweigh the arguments against its establishment. The Iraqi truth commission's amnesty guarantee must be unconditional if (1) the perpetrators disclose the facts and (2) their crimes were committed with political motivation. Unlike in the South African example, where amnesty was given in exchange for

¹⁷⁴ Gary J. Bass, *At Saddam's Trial, the Law Is Just Part of the Picture*, WASH. POST, Jan. 18, 2004, at B03. Saddam Hussein, and other major Iraqi war crimes suspects, will likely stand trial under an Iraqi Governing Council statute passed days before the U.S. military captured Saddam. *Id.* The statute creates a special independent Iraqi court, with jurisdiction over genocide, crimes against humanity and war crimes committed by Iraqis from July 17, 1968, until May 1, 2003. *Id.*

Definitions of the charges come right from the Rome Statute of the International Criminal Court. The Iraqi Governing Council will pick the prosecutors and judges (who can be non-Iraqi). *Id.* The statute requires that the prosecutors (who must be Iraqi) be assisted by non-Iraqi advisers. This permits international experts with valuable experience from the war crimes tribunals for Rwanda, Sierra Leone, and the former Yugoslavia to help with the investigations and ensure that these trials meet international legal standards. *Id.*

information, other states' truth commissions transferred their files to the state's justice department so that the judiciary could investigate individual perpetrators named in the information received by the commission. However, the problem with mixing truth commissions and criminal trials in this manner is that it compromises the perpetrators' incentive to come forward with their crimes. Say, for example, the Iraqi government established an amnesty process, which recognized five different levels of former perpetrators (based on the severity of an individual's crimes). The top two levels of perpetrators would be referred to the justice department for prosecution, but the bottom three would be granted amnesty in exchange for information. This would create a situation where many people would not step forward out of fear that their crimes would fall into the top two tiers. This would defeat the truth commission's primary goal because without these individual's accounts a full and complete record of the past cannot be established.

VIII. CONCLUSION

Practical solutions to addressing human rights atrocities in transitional states such as Iraq do not come easy. Resentment and despise for the perpetrators of this type of violence must be tempered by a realistic view of the state of these societies in the aftermath of conflict. A carefully structured hybrid system of domestic trials and a truth commission could allay the fears of many that Saddam and his men were receiving impunity while yet facilitating the peaceful transition of power to a truly democratic state.

With Saddam in custody, and the Ba'ath Party ousted from power, the Iraqi people finally have the opportunity to determine their own fate.¹⁷⁵ Public protests and demonstrations throughout Iraq in the months following Saddam's capture indicate the majority of Iraqis yearn for a democratic-style government with popularly elected leaders.¹⁷⁶

¹⁷⁵ Office of the Press Secretary, *supra* note 3.

¹⁷⁶ On January 19, 2004, nearly 100,000 Iraqi citizens rallied in the streets of Baghdad protesting the U.S. proposal to install a provisional Iraqi government on July 1. *CNN Daybreak* (Cable News Network Broadcast, Jan. 19, 2004). The demonstrators opposed the U.S. solution, demanding instead that direct elections be held in the summer of 2004. *Id.* Both the U.S. and the U.N. believed this demand was implausible, due to the delicate situation in Iraq and the underrepresented minority groups throughout Iraq. *Id.*